# PUBLIC ÆSTHETICS.

THE growth of the civic and municipal æsthetic sense has been a significant feature of recent American evolution. It has been manifested in making utility and sentimental charm go hand in hand — in selecting for parks and other public places of recreation the sites of natural beauties or wonders, thereby preserving the latter from private vandalism and greed. Systematic thought and — whatever the results — the best intentions are being devoted to the artistic opening of streets, the laying out of parks, and the exterior and interior construction of public buildings. In the mural decoration of public buildings American artists have produced a long series of pictures conceived on a heroic scale and executed with intrinsic excellence. There are two courthouses in the city of New York whose paintings and stained-glass windows render them constantly the shrine of tourists. The public cheerfully approves the expenditure of large sums in order to secure the highest talent available for work whose end is purely æsthetic.

The authority to appropriate land for parks or recreation grounds has been the most important factor in the promotion of public æsthetics. The government of the United States has assumed without question the right to dedicate to that purpose land in territories and land which it still reserved in states, and since the decision of the Supreme Court of the United States in United States *v.* Gettysburg El. Ry. Co.,[1] it has seemed highly probably that the federal government might, in proper cases, exercise a power comparable in breadth to that of the states. It was held that an appropriation by Congress for locating and preserving the lines of battle at Gettysburg, Pennsylvania, and further developing and beautifying the site, — as, for example, by the erection of monuments and tablets, — is an appropriation for a public use, and that in the promotion of such use the United States may, in the exercise of eminent domain, condemn and take the necessary lands of individuals and corporations.

Previous to that decision it was doubted whether the federal government could exercise the right of eminent domain for any-

[1] 160 U. S. 668.

thing beyond strictly utilitarian ends, such as the acquirement of land for custom-houses, post-offices, etc. Indeed, the decision of the same case in the Circuit Court of Appeals,[1] which the Supreme Court reverses, took that restricted view. Mr. Justice Peckham, speaking for a unanimous bench, discourses with considerable eloquence upon patriotism, its value as a national asset in time of need, and the legitimacy of fostering it by tangible memorials. His concluding words on this branch of the discussion are of general significance:

"No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

"It is needless to enlarge upon the subject, and the determination is arrived at without hesitation that the use intended as set forth in the petition in this proceeding is of that public nature which comes within the constitutional power of Congress to provide for by the condemnation of land."

The spirit of this language would seem broad enough to authorize by analogy the exercise of eminent domain for any important but purely sentimental purpose where federal action was alone open or would be most effectual. An æsthetic public purpose is comparable in kind to a patriotic public aim, and in the one quite as much as in the other a utilitarian element inheres. Positive beauty and freedom from deformity enhance the value of possessions national, state, and municipal. Localities that charm the senses will attract visitors and purchasers and constantly tend to appreciate pecuniarily. The utilitarian side of public æsthetics is highly potential in the attractively planned and constructed city, though not there so palpably and sordidly displayed as by summer boarding-house keepers who make money out of the mountains and the lakes.

Upon the question of national authority it is of interest that a joint international commission has been appointed by the United States and the Dominion of Canada to rescue Niagara Falls from threatened injury through commercial vandalism. Pursuant to a joint resolution of Congress, the American members of the com-

[1] 67 Fed. Rep. 869.

mission have reported what action in their judgment is necessary and desirable to prevent the further depletion of water and otherwise to preserve Niagara Falls. The probable outcome of the negotiations will be a treaty between Great Britain and the United States, "having for its purpose the preservation of all the natural scenic features of the falls of Niagara by prohibiting or duly restricting the diversion of the waters of the Niagara River above the falls." Under date of October 14, 1905, the Attorney-General, advising the President, wrote in part as follows:

"As to the ground for federal intervention, so far as proposed, I think there can be no fair doubt. Strictly, of course, since the water withdrawn from the river above the falls is taken below the farthest navigable point on that side and is returned to the river (subject to a negligible amount of waste) below the falls above its navigable portion on that side, the equal and free rights in the stream as a navigable waterway in the Great Lakes system which were assured by the ordinance of 1787 are not at all imperilled. Nevertheless, I think that the character of Niagara Falls as one of the greatest natural wonders, its situation in a boundary river on the frontier of a foreign country, its undoubted historical relation as a natural possession and common heritage, all these elements in the case would fully justify you in proposing through the ordinary diplomatic channels the consideration of this subject by the two Governments immediately concerned."

On March 27, 1906, President Roosevelt, in submitting the report of the American members of the commission to Congress, said:

"I earnestly recommend that Congress enact into law the suggestions of the American members of the International Waterways Commission for the preservation of Niagara Falls, without waiting for the negotiation of a treaty. The law can be put in such form that it will lapse, say in three years, provided that during that time no international agreement has been reached. But in any event I hope that this nation will make it evident that it is doing all in its power to preserve the great scenic wonder, the existence of which, unharmed, should be a matter of pride to every dweller on this continent."

Here it will be seen that the substantial ground for action is æsthetic, and not commercial or utilitarian, the fact that the Niagara River forms an international boundary line affording legal occasion and justification for the exercise of federal power.

A few years ago it was proposed that the United States take steps to preserve the Palisades along the Hudson River from the depredations of quarrymen. The greater and most beautiful part of the Palisades is in New Jersey, while the view is had either from

New York opposite or the river between. New York could not condemn land in another state; New Jersey pleaded poverty, and contended that it would be a hardship to compel its people to pay for a fine prospect to be enjoyed outside of its boundary lines. At the time of the origin of the movement United States *v.* Gettysburg El. Ry. Co. had been before the Circuit Court of Appeals, where federal authority to condemn land for preserving the site of the Battle of Gettysburg was denied, and the Supreme Court of the United States had not yet reversed the decision. In agitating for national action it was therefore taken for granted that a purely sentimental use could not be a public use authorizing the exercise of eminent domain. It was accordingly proposed that the United States acquire the Palisades as a military post, and it was argued that long-distance artillery placed upon that height could very effectively deal with foreign invading vessels in time of war. This contention was realized to be more or less of a subterfuge and the movement for federal aid was in time abandoned. Efforts were continued, and indeed are still on foot, to accomplish the end through co-operative state legislation and private subscription. Faltering and clumsy as this policy naturally has been, there is ground for hope that it will be successful in substantially preserving the Palisades.

While the right to take land within a state may not be so clear as the authority to deal with the Niagara River by virtue of the international treaty-making power, it seems highly probable, under the broad language of Mr. Justice Peckham, that the Supreme Court would sanction federal action with regard to the Palisades, and it is submitted that on principle an æsthetic use should, in the same manner as a patriotic use, be treated as a legitimate public use within the federal power of acquirement and permanent trusteeship.

The authority of a state or municipality, under state sanction, to appropriate or acquire land for public parks or recreation grounds is practically plenary. The promotion of public health is often directly, and perhaps always at least indirectly, involved. But health considerations are not at all essential for the legality of state action. At the opening of his opinion in Shoemaker *v.* United States [1] Mr. Justice Shiras remarks that "in the memory of men now living, a proposition to take private property without the

[1] 147 U. S. 282 (1892).

consent of its owner for a public park and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power." He proceeds, however, to show, by abundant citation of state court decisions, that such power is now universally recognized, and "that land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health, or business, is taken for a public use."

A public park once established is to be held sacred to the ends of recreation and æsthetic gratification. Business enterprises which are incidental to the use or enjoyment of a park may be licensed to be conducted in or about it, but business *per se* is to be rigidly excluded. Perhaps most of the decisions are negatives in that they deny injunctions, because the kind of business in question would legitimately contribute to the comfort or convenience of visitors to the park. These negatives are, however, pregnant in their implied condemnation of trades not affected with any public use and which would exist solely for the profit of their proprietors. A notable decision granting an injunction was made comparatively recently at a special term of the New York Supreme Court.[1] The case was never appealed so as to receive the consideration of a court *in banc*. Mr. Justice Francis M. Scott, however, who decided the matter at the special term, wrote an opinion which forms a valuable contribution to a subject upon which legal literature is not very voluminous. The theoretical scope of the decision is perhaps limited by the circumstance that it was made under and interpreted a special statute, being section 612 of the present charter of the city of New York. That clause defines the duties of a park commissioner as

"to maintain the beauty and utility of all such parks, squares, etc., and to execute . . . all measures for the improvement thereof for ornamental purposes and for the beneficial uses of the people of the city."

Thus it will be seen that the protection of æsthetic features is expressly commanded. The action was to enjoin the use of a fence surrounding a portion of one of the parks for advertising purposes by means of placards, signs, and billboards, under a license a park commissioner had assumed to grant. The court held that the use was illegal, the license void, and that the injunc-

[1] Tompkins *v.* Pallas, 47 N. Y. Misc. 309.

tion should be granted. Although, as has been said, the decision was under a particular statute, it is believed that Mr. Justice Scott's reasoning, fortified by a former New York decision cited by him, is broad enough to cover cases of all public parks. If it be not definitely settled that disfiguring public parks by advertisements is illegal, at least it can be said that the trend of authority is strongly in that direction, and that it is highly probable that such position will be taken in future cases. The following language from Justice Scott's opinion is worthy of reproduction:

"A public park has been defined by the Court of Appeals as 'a piece of ground enclosed for purposes of pleasure, exercise, amusement, or ornament,'[1] and commissioners charged with the care of such parks have often been held justified in granting licenses for the maintenance within parks of such conveniences as would enhance the opportunities of the public to use and enjoy the parks as places of resort, amusement, recreation, and exercise. In every case, however, in which the exercise of this power has been sustained it has been because the use authorized has in some way contributed to the use and enjoyment of parks by the public. The defendant Pallas gives in his affidavit opposing this motion a list of some of the licenses heretofore granted with respect to the city's parks, including restaurants, refreshment stands, boats, stages, boathouses and flower-stands. This very list of itself shows that heretofore the issue of licenses has been limited to objects which would tend to afford additional facilities for the beneficial use and enjoyment of the parks by the public, and have come to be generally recognized as appropriate aids to the full enjoyment of public pleasure grounds. No such claim can be made for the advertisements of which the plaintiff complains. It is too obvious to require demonstration that business advertisements painted upon a board fence contribute nothing to the beneficial use of the park by the public. The defendant commissioner, then, had no authority, either by the express terms of any statute or by any reasonable implication, to grant a license for the exhibition of the advertisements, and his attempt to do so was illegal and void."

Assuming, therefore, the right to protect and promote æsthetic ends on public property, whether buildings, streets, or parks, the legal crux arises as to the control of private property in the interest of the general sense of beauty. Here there is a dearth of affirmative precedents. Indeed, the only actual decision authorizing positive action within the writer's knowledge is that in the famous Copley Square case by the Supreme Judicial Court of

[1] Perrin *v.* New York, etc., R. Co., 36 N. Y. 120.

Massachusetts.[1] That case recognized the validity of a legislative act of Massachusetts limiting the height of buildings "now being built or hereafter to be built, rebuilt, or altered," on streets adjoining Copley Square in the city of Boston, upon making suitable compensation to owners for injuries sustained through the impairment of the use of their property. Incidentally, also, the regulation of the right to erect towers, domes, sculptured ornaments, and chimneys extending above ninety feet, the limit fixed for buildings themselves, was approved. The kernel of the reasoning of the court lies in the following language:

"The grounds on which public parks are desired are various. They are to be enjoyed by the people who use them. They are expected to administer, not only to the grosser senses, but also to the love of the beautiful in nature in the changing forms which the changing seasons bring. Their value is enhanced by such touches of art as help to produce pleasing and satisfactory effects on the emotional and spiritual side of our nature. Their influence should be uplifting and, in the highest sense, educational. If wisely planned and properly cared for they promote the mental as well as the physical health of the people. For this reason it has always been deemed proper to expend money in the care and adornment of them to make them beautiful and enjoyable. Their æsthetic effect never has been thought unworthy of careful consideration by those best qualified to appreciate it. It hardly would be contended that the same reasons which justify the taking of land for a public park do not also justify the expenditure of money to make the park attractive and educational to those whose tastes are being formed and whose love of beauty is being cultivated. It is argued by the defendants that the Legislature, in passing this statute, was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of the owner. But if the Legislature, for the benefit of the public, was seeking to promote the beauty and attractiveness of a public park in the capital of the Commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received, we cannot say that the law-making power might not determine that this was such a matter of public interest as to call for expenditure of public money, and to justify the taking of private property."

The court cites as approximate precedents cases of the expenditure of public money for patriotic purposes, as the erection of monuments, statues, gates, or arches, or even a memorial

[1] Attorney-General *v.* Williams, 174 Mass. 476.

hall.[1] There may also be added as kindred examples of intangible public uses statutes that have been upheld prohibiting the use of a representation of the Arms or Great Seal of a state, or of the flag of the United States, for commercial advertising or trade-mark purposes.[2]

It seems only a natural step — indeed, considering the growth of the æsthetic sentiment, an inevitable step — from recognizing sentimental public uses of a patriotic or historical nature to the allowance of purely æsthetic uses, as was done in Attorney-General *v.* Williams, *supra.* As above stated, no other case exactly in point is known, but there has been very wide discussion of the Williams case in periodicals and by text writers, and, so far as the writer is aware, its doctrine has been universally approved. Some uncertainty was expressed in the opinion whether the end in view might not have been legally accomplished under the police power, without compensation, instead of through the exercise of eminent domain. The subsequent decision by the same court in Parker *v.* Commonwealth,[3] while it does not squarely pass upon the question, intimates that the right to proceed under the police power would have been at least gravely doubtful. Such doubt has been emphasized by a series of cases in different states holding that a legislature has no power to authorize a municipal corporation to prohibit the placing of signs or advertisements upon private property, or fences enclosing private property, or to limit the height and form of enclosures of private property, from merely æsthetic motives.[4]

The purport of these judicial utterances — the authorities on the subject are believed to be in unbroken harmony — is that statutes or ordinances interfering with the use of private property may be upheld under the police power, if their purpose can reasonably be perceived to be the promotion of the public health, comfort, or physical convenience, but if the aim be merely the suppression of an eyesore, they will constitute an unconstitutional invasion of individual rights.

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[1] Kingman *v.* Brockton, 153 Mass. 255.

[2] Comm. *v.* Sherman Mfg. Co., 75 N. E. Rep. 71 (Mass.); Halter *v.* State, 105 N. W. Rep. 298 (Neb.).

[3] 178 Mass. 199.

[4] New Jersey, etc., Co. *v.* Atlantic City, 58 Atl. Rep. 342 (N. J.); Passaic *v.* Paterson, etc., Co., 62 Atl. Rep. 267 (N. J.); Chicago *v.* Gunning System, 73 N. E. Rep. 1035 (Ill.); People *v.* Green, 85 N. Y. App. Div. 400. Also see many cases cited in Passaic *v.* Paterson, etc., Co., *supra.*

In his work on Police Power Mr. Ernst Freund remarks:[1]

"It is generally assumed that the prohibition of unsightly advertisements (provided they are not indecent) is entirely beyond the police power, and an unconstitutional interference with rights of property. Probably, however, this is not true. It is conceded that the police power is adequate to restrain offensive noises and odors. A similar protection to the eye, it is conceived, would not establish a new principle, but carry a recognized principle to further application."

The analogy to offensive noises and odors is *a priori* clear enough. The difficulties in the way of effectuating it are, first, the substantive one of interference with constitutional rights, and it may be said that some of the decisions in billboard cases above cited have been made since the publication of Mr. Freund's book. Moreover, by custom and legal adjudication, the maintenance of advertising signs in windows or on outside walls of buildings ranks as a very material business factor.

Second, there is a practical difficulty to which Mr. Freund himself calls attention. He remarks in a note to section 182 that although the power to restrain unsightly signs be conceded,

"the manner of its exercise would give rise to constitutional difficulties. Under our government system these regulations would have to proceed from the legislative authority of either state or locality. Such regulations would have to define what signs are prohibited, and some test would have to be discovered by which to discriminate that which is merely unæsthetic from that which is so offensive as to fall under the police power, since the prohibition of all advertising signs would be out of the question."

It is believed that both on theoretical and practical grounds the law must be taken as settled that, although public æsthetic ends may be effectuated by statute or ordinance through the exercise of eminent domain, the same object may not be accomplished by legislation under the police power without compensation.

It does not, however, follow that the analogy to offensive sounds and odors will always remain utterly futile. It is submitted that judicial power might be exercised under the facts of a given case to restrain a particular advertisement, or collection of advertisements, as a nuisance. An inherently lawful business may constitute a nuisance because of the manner or place in which it is conducted. It is entirely possible that the increasing æsthetic

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[1] § 182.

sentiment will, in time, sanction the judiciary in taking cognizance of particular nuisances, as is now done with nuisances of noise and smell. It is well settled that courts may take notice that the standard of comfort differs according to the situation of property and the class of people who inhabit a locality. In this country, as well as in England, the character of a neighborhood — whether residential or business — is vitally important on the question of nuisance. Accordingly, it might be determined that advertisements that disfigured a certain neighborhood entirely devoted to residence fell within the purview of progressive equitable jurisdiction.

The suggestion has also been made that advertisements may be controlled through the taxing power. There is no good reason why that form of business enterprise should not be taxed, and taxed heavily. It is already obnoxious to the æsthetic sense of the community, and is daily becoming more so. If billboard advertisements must exist, the public might as well derive a revenue from them, and if the tax be made substantial and graded according to the space employed, it may indirectly tend toward diminution of the evil itself. Such legislation would be analogous in policy and effect to liquor tax laws. A statute applying generally to all use of billboards and with uniform regulation as to gradation of tax would doubtless be constitutional. It is improbable, however, that the abuse could be entirely suppressed through taxation. Chief Justice Marshall's famous *dictum*[1] that the power to tax involves the power to destroy has been materially limited in its application.[2] The present writer shares the doubt expressed by the author of the note in Cooley on Taxation[3] whether an affirmative exercise of nominal taxing power would be justified that has not revenue in view, "but is only called a tax in order that it may be employed as an instrument of destruction."

There is one form of advertising for the suppression of which it is believed judicial power might even now be exercised. The custom has sprung up in cities of covering the whole side or front of a building with advertisements pictured or lettered in electric lights. Persons dwelling near these flamboyant displays must feel as if they were passing their nights in the Land of the Midnight Sun. The glare is, of course, intensely disagreeable, and further-

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[1] McCullough *v.* Maryland, 4 Wheat. (U. S.) 431.

[2] Knowlton *v.* Moore, 178 U. S. 41, 60.

[3] 3d ed., 14.

more it must interfere with sleep in the early hours of the night as seriously as noises do.[1] This would be especially true in the summer season, when comfort calls for open windows. It would seem that particular advertisements of this kind might be restrained as nuisances, not merely on æsthetic grounds, but because sleeplessness and broken rest impair the health. Indeed, general ordinances against advertisements of that class might be upheld as health laws.

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[1] Hill *v.* McBurney, 38 S. E. Rep. 42 (Ga.).